NORTHERN DISTRICT OF TEXAS
SEP 23 1999
NANCY DOHERTY, CLERK
By
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

LOUIS JONES, JR.,	)	
	)	
Petitioner,	)	01-10925 (1)
	)	
v.	)	NO. 5:95-CR-047-C
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

The petition for rehearing has been denied by the United States Supreme Court. Therefore, the Court hereby appoints Mr. Chuck Lanehart and Mr. Floyd D. Holder, Jr. to represent LOUIS JONES, JR. in post-conviction proceedings. Counsel are advised that there is a one-year limitations period pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Clerk shall furnish the appropriate CJA forms to Messrs. Lanehart and Holder.

SO ORDERED.

Dated September 22, 1999.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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EXHIBIT A

1270

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 27 1999
NANCY DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

LOUIS JONES, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. 5:95-CR-047-C
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

The Court has been advised of a conflict that prevents Mr. Chuck Lanehart from serving as Petitioner's attorney.

IT IS, THEREFORE, ORDERED that Professor Timothy W. Floyd is appointed to serve as co-counsel to Mr. Floyd D. Holder, Jr. to represent LOUIS JONES, JR. in post-conviction proceedings. Counsel are advised that there is a one-year limitations period pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Clerk shall terminate Mr. Lanehart as an attorney of record and shall furnish the appropriate CJA forms to Professor Floyd.

Dated September 27, 1999.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

LOUIS JONES

Petitioner,

vs

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Capital Case)

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ATTORNEYS FOR PETITIONER LOUIS JONES

CAPITAL CASE

QUESTIONS PRESENTED

I. **Should this Court reverse the refusal of the Court of Appeals to grant a Certificate of Appealability where the Petitioner demonstrated that constitutionally deficient performance of trial counsel in requesting erroneous and misleading instructions made it reasonably probable that the sentence would have been different but for the erroneous instructions?**

Subsidiary Questions:

Is reversal required where the court of appeals based its holding on the *Strickland* prejudice inquiry upon an erroneous understanding of the consequences of juror non-unanimity?

Should the reviewing court be allowed to consider juror affidavits demonstrating that the erroneous and misleading instructions likely affected the verdict?

II. **Should this court reverse the Fifth Circuit's decision that counsel's full and unequivocal confession of Petitioner's guilt on opening statement immediately after entering a plea of not guilty did not violate Petitioner's constitutional Fifth and Sixth Amendment rights?**

INTERESTED PARTIES

Names listed in style of this cause are all the interested parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

LOUIS JONES

Petitioner,

vs

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Capital Case)

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed March 27, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals, *United States of America vs Louis Jones* is attached as Appendix A. The opinion of the district court is attached as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on March 27, 2001. This court's jurisdiction is invoked under 28 U.S.C. § 1254(l). The district court had jurisdiction

pursuant to 28 U.S.C. § 2255. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented invoke the right to assistance of counsel contained in the Sixth Amendment to the constitution and the due process guarantee of the Fifth Amendment to the constitution.

STATEMENT OF THE CASE

Petitioner Louis Jones, Jr., a retired Master Sergeant in the United States Army Rangers, was convicted of kidnaping with death resulting to the victim, in violation of 18 U.S.C. § 1201. The facts of the case and the procedural history are set forth in the previous opinions on direct appeal, *Jones v. United States*, 527 U.S. 373 (1999), *affirming United States v. Jones*, 132 F.3d 232 (5th Cir. 1998). Petitioner filed a Motion to Vacate the Conviction and Sentence under 28 U.S.C. § 2255. That motion was denied by the District Court and the Fifth Circuit denied a certificate of appealability. *United States v. Jones*, 287 F.3d 325 (5th Cir. 2002).

The following additional facts are particularly relevant to the issues in this petition. Petitioner's trial counsel requested an instruction at the sentencing phase of the trial that included the alternative of a "lesser sentence" than life imprisonment, when such a sentence was not possible under the statute under which petitioner had been convicted. In holding that this error did not cause prejudice, the court below erroneously asserted that the result of a hung jury would have been the impaneling of a new sentencing jury. This holding was directly contrary to the unanimous holding of this Court in this case on direct appeal, which held that in the event of a hung jury, the sentencing determination passed to the court.

Petitioner's court appointed counsel, on opening statement at the guilt/innocence phase of trial after a plea of not guilty, admitted Petitioner's responsibility without justification or excuse, for the death of the victim Tracie McBride. Other Circuits have held that such admissions of guilty by defense counsel lessen the government's burden of proof and are harmful as a matter of law. The Fifth Circuit recognized the holdings of the Eleventh, Ninth, and Sixth Circuit but distinguished this case. The court reasoned that admitting your client's guilt was not inconsistent with forcing the government to prove its case.

REASONS FOR GRANTING THE WRIT

I. **Should this Court reverse the refusal of the Court of Appeals to grant a Certificate of Appealability where the Petitioner demonstrated that constitutionally deficient performance of trial counsel in requesting erroneous and misleading instructions made it reasonably probable that the sentence would have been different but for the erroneous instructions?**

Subsidiary Questions:

Is reversal required where the court of appeals based its holding on the *Strickland* prejudice inquiry upon an erroneous understanding of the consequences of juror non-unanimity?

Should the reviewing court be allowed to consider juror affidavits demonstrating that the erroneous and misleading instructions likely affected the verdict?

A. Introduction and Summary

Defense counsel rendered constitutionally ineffective assistance in requesting erroneous and misleading jury instructions at the penalty phase of the trial. Those instructions informed the jury, erroneously, that there were three sentencing options available: death, life without the possibility of release, and "some other lesser sentence." In fact, there were only two possible sentences available in this case: death, and life without the possibility of release. Defense counsel's request of this harmful, misleading, and erroneous sentencing instruction constituted deficient performance. Moreover, this conduct by defense counsel caused prejudice. Defense counsel's injection of erroneous and inaccurate information about a fictitious lesser sentence into the deliberative process confused the jury and diverted from its task--that of choosing between a sentence of death or of life without the possibility of release. In fact, the evidence is overwhelming and un-controverted that the sentence would have been different but for the erroneous instructions.

The Court of Appeals erred in denying the certificate of appealability. In analyzing this claim, the Court of Appeals did not discuss the first *Strickland* prong, whether counsel's performance was deficient. Even more problematic was the court's discussion of the prejudice prong. In flat contradiction and in blatant disregard of this Court's unanimous holding on direct appeal in this case, the court of appeals erroneously asserted that the consequence of juror deadlock would be the impaneling of a new sentencing jury. This erroneous assumption fatally tainted the court's analysis, and that error alone requires a reversal and remand to the Court of Appeals to consider the case under the correct rule of law.

B. The *Strickland* Standard

The Sixth Amendment guarantees criminal defendants the reasonably effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), this Court established the familiar two-part test for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In order to satisfy the first prong of the *Strickland* test, the petitioner must show that counsel's acts fell beneath an objective standard of reasonable professional assistance. *Strickland*, 466 U.S. at 690. In order to demonstrate prejudice under the second prong of the *Strickland* inquiry, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. In Requesting That Erroneous and Misleading Instructions as to the Sentencing Alternatives Be Given to the Jury, Defense Counsel's Performance Fell Beneath the Standard of Reasonable Professional Assistance

The Defendant was convicted by the jury of kidnaping with death resulting under 18 U.S.C. § 1201. The only possible sentences for that offense are death or life imprisonment. Nonetheless, the instructions to the jury in the penalty phase referred to **three** possible sentences: death, life without the possibility of release, or "some other lesser sentence." The verdict forms also included the three options of death, life, or "some other lesser sentence."

The injection of the non-existent lesser sentence alternative into the deliberations tainted the verdict; as a result of these erroneous sentencing instructions, a specter of unreliability has hung over the death sentence in this case since the trial. Because defense counsel had not objected to those instructions, however, both the Court of Appeals and this Court on direct appeal examined the validity of those instructions under the exacting "plain error" standard.

Now, in contrast, in this 2255 proceeding the issue before the Court is the ineffective assistance of counsel. In analyzing that claim, the Court must focus on the incompetent conduct of defense counsel. Defense counsel not only did not object to the instructions or the verdict forms; defense counsel specifically requested, both in written objections and in oral conference, that the reference to a "lesser sentence" than life imprisonment be included in the instructions. Moreover, it is clear that the only reason that the "lesser sentence" option found its way into the instructions was that defense counsel requested them. At the evidentiary hearing in this case counsel for the government emphasized: "I would also note that the Government never requested that that instruction be given. We literally did not oppose that it be given to the jury." T-83.

To understand how the inclusion of the lesser sentence option so tainted the deliberations, and why defense counsel's request of those instructions was so incompetent, the instructions must be viewed in the entire context of the sentencing hearing. At the sentencing phase of the trial, defense counsel's apparent strategy was to try convince the jury to sentence the defendant to life rather than death. During the individual voir dire in this case, the vast majority of the venire members were repeatedly told or led to believe (by both the Government and the defense, without any correction by the District Court) that the only possible punishments in this case were death or life imprisonment without the possibility of release or parole.[1] These included nine of

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[1] See R 13: 142, 155, 160, 170, 182-186, 192-193, 201-202, 206; R 14: 215, 217, 225, 232, 234-235, 244-245, 249, 260, 269-270, 274, 281, 287-288, 296-297, 299, 310, 313, 318, 320,

the twelve persons who actually served on the jury which sentenced Louis Jones to death.[2] Moreover, defense counsel emphasized in both opening statement and closing argument that the only alternatives were death or life without release.

The defense strategy apparently was premised upon the jury knowing that if they did not sentence the defendant to death, he would receive a sentence of life without the possibility of release. Such a strategy would make sense under the circumstances. A jury is more likely to impose a death sentence if the jury believes that the Defendant will receive or serve less than a natural life sentence. Indeed, this Court has consistently recognized the crucial importance of the jury's understanding of the possibility of the defendant being released from prison. In both *Kelly v. South Carolina,* 534 U.S. 246 (2002), and *Shafer v. South Carolina*, 532 U.S. 36 (2001), this Court has recently and emphatically reaffirmed the holding of *Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994): where future dangerousness is at issue, and that life without parole is the only alternative to a death sentence, due process requires that the jury be told of the defendant's parole ineligibility.

The premise of *Simmons, Shafer,* and *Kelly* is that jurors who believe that the defendant may some day be released from prison are more likely to sentence that defendant to death.[3] In

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325-326, 332, 336, 352-354, 365, 369, 380, 385, 397, 400, 406, 411, 417, 420, 423, 425, 445-447, 449, 453, 460-462, 468, 471-475, 481, 488, 496, 497, 506, 512-513, 516, 520; R 15: 536-538, 572-573, 579-580, 583, 590-591, 594-595, 613, 618, 626, 633, 641, 650, 660, 670, 673, 677, 684, 691, 698, 706-707, 709-710, 713, 721, 737, 740, 744; R 16: 751, 752, 755, 761-762.

[2] Billy Flemmons (R 14: 225); Fonty Carthel (R 14: 269-270, 274); Lucila Banda (R 14: 385); Jean Tripp (R 14: 397, 400); Corina Puga (R 14: 406, 411); Cassandra Hastings (R 14: 496-497); James Jowers (R 15: 572-573, 579-580); Mary Martin (R 15: 618); and Linda Sadler. (R 15: 633)

[3] "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial

this case--in which the defendant's future dangerousness was at issue and the only alternative to a death sentence was life without the possibility of parole--the jury was not informed that if the defendant were not sentenced to death, he would spend the rest of his life in prison. Even worse, the jury was affirmatively misinformed that the defendant could receive a sentence of less than life imprisonment.

By injecting the erroneous lesser sentence option into the case, defense counsel fatally undercut the entire defense strategy up to that point. The only explanation for this conduct is incompetence: defense counsel was asleep at the switch during this critical stage of the proceedings. At the evidentiary hearing in this 2255 proceeding, defense counsel insisted that his entire strategy at the trial was to convince the jury to sentence the defendant to life without the possibility of release. The defense lawyers concluded that life was the only practical option to a death sentence; it is clear that a lesser sentence than life did not even enter into their thinking as to possible sentences. T-42-44.

How, then, did defense counsel include the unavailable and misleading "lesser sentence" in the proposed instructions? Counsel admitted at the evidentiary hearing that he had done virtually no research into the sentences available in this case. His research "consisted mainly in looking at the death penalty statute." T-25. That is, he had only looked to the procedural provisions of the federal death penalty statute, 18 U.S.C. § 3591 et seq. He had apparently not even considered the fact that the substantive statute under which the defendant was charged, 18 U.S.C. § 1201, circumscribed the available sentences in this case. And it was that fact that triggered, or should have, the applicability of the *Simmons* principle to this case.

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court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause." *Simmons*, 512 U.S. at 163-64 (plurality opinion).

In short, defense counsel's request of the lesser sentence option fell outside the wide range of professionally competent assistance. To deliberately inject the alternative of a lesser sentence into the instructions--when such a sentence was not possible under the law, and would completely undercut the defense strategy of pleading for a life sentence--was objectively unreasonable and constituted deficient performance under *Strickland.*

B. There is a Reasonable Probability that but for Counsel's Deficient Performance the Result Would Have Been Different

The holding of the Court of Appeals as to prejudice in this case was premised on a plainly erroneous legal conclusion. That fact alone requires that the case be summarily reversed and remanded to the Fifth Circuit to conduct the prejudice inquiry in the light of the correct legal standards. Alternatively, should this Court choose to conduct the prejudice inquiry, the record in this case is clear and un-controverted that counsel's error caused prejudice.

"Prejudice" is established if, had counsel not performed deficiently, there exists a "reasonable probability" that the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694 (emphasis added). *Strickland* does not require that the defendant prove that counsel's deficient conduct "more likely than not altered the outcome in the case." *Id.* at 693-94. As this Court held in *Strickland*, the prejudice prong imposes a lower burden of proof than the preponderance standard; the "reasonable probability" standard does not require that the reviewing court conclude that it is more likely than not that a different result would have been obtained absent counsel's errors and omissions.

The holding of the Court of Appeals in this case on the prejudice prong of *Strickland* is fatally flawed because it is based upon an incorrect understanding of the law. This Court has unanimously held, **in this very case**, that under the Federal Death Penalty Act in the event of a

hung jury the sentencing determination passes to the court. *Jones v. United States*, 527 U.S. 373, 380-81 (1999); 18 U.S.C. § 3593(h)(2)(C). However, the Court of Appeals asserted, erroneously and in blatant disregard of this Court's unanimous holding on this precise issue, that a jury deadlock at the sentencing hearing would result in impaneling a second jury. In this case, the only possible sentence in that event would have been a life sentence. The Fifth Circuit's obvious misunderstanding of the law prompted it to misapply the prejudice prong of *Strickland*.

As this Court also held in *Jones*, there is a strong interest in encouraging jury unanimity. For that reason, this Court held that jurors need not be instructed on the consequences of non-unanimity. *Jones v. United States*, 527 U.S. at 382-84. Petitioner is not challenging that holding.

But in the prejudice inquiry under *Strickland*, the reviewing court must determine whether there is a reasonable probability that the result would have been different. That inquiry is necessarily retrospective. Although, prospectively, it is important to encourage jurors to reach unanimous verdicts, it is a fact that juries sometimes do reach deadlock. The reality is that if even one juror in Petitioner's case had held out for a life sentence, the result would **not** have been the impaneling of a new jury; the result would be the imposition of a life sentence. Thus, in conducting the "prejudice" analysis regarding errors in the *sentencing* decision, the reviewing court must ask only whether there is a reasonable probability that a single juror's mind could have been changed had counsel performed effectively. *Cf. Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) ("[G]iven the unanimity required at the Louisiana punishment phase, the proper frame of reference, at least with regard to the punishment assessed, is whether the mind of one juror could have been changed with respect to the imposition of the sentence of death.").

The prejudice analysis of the Court of Appeals is thus premised on a plainly erroneous legal conclusion. The case should be summarily reversed and remanded to the Fifth Circuit to conduct the prejudice inquiry in the light of the correct legal standards.

Alternatively, should this Court choose to conduct the prejudice inquiry, the record in this case is overwhelming and un-controverted that counsel's error in injecting the "lesser sentence" alternative caused prejudice. Under *Strickland*, courts routinely must determine whether there is a reasonable probability that a result would have been different, and the court must use its best judgment to make that decision. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000). In this case, however, the Court need not speculate as to the effect the erroneous instructions had on the deliberations. From uncontradicted evidence already in the record, it is clear that the jury instructions concerning a "lesser sentence" were critical in the jury's decision to sentence Louis Jones to death.

After the jury returned its verdict of death, two events occurred which showed that the lesser sentence instructions had fundamentally tainted the jury's deliberations. First, on November 8, 1995, only five days after the jury returned its verdict, juror Christie Beauregard contacted the defense and let them know the following facts about what had happened during the jury's deliberations:

1. The jury was originally hung 8-4 in favor of death;

2. The jury believed that if it was hung and unable to produce a unanimous verdict for death or life without release, then the judge would impose a "lesser sentence" on Petitioner -- which no one wanted;

3. The pressure mounted when the vote became 10-2, with only Beauregard and Cassandra Hastings (the lone black juror) holding out for life; and

4. Succumbing to the pressure of the group -- **and based on their belief that a hung jury would result in a less-than-life sentence for Petitioner** -- Beauregard and Hastings caved in, and voted for death.

Beauregard also indicated that, if the jurors had known that non-unanimity would not result in a less-than-life sentence, she and (she believed) several others would not have agreed to vote for a death sentence. (Beauregard's remarks were memorialized in a sworn affidavit by investigator Daniel Salazar, who, along with one of the defense attorneys, participated in the telephone conversation with Beauregard. Salazar's affidavit is attached at Appendix C.)

Not long after that, juror Cassandra Hastings, who also had misgivings about the verdict, also contacted the defense. As a result, she executed an affidavit which is attached as Appendix D. In addition to corroborating much of what Beauregard had said, Hastings stated that all but three jurors were willing to vote to impose a sentence of life without release on Petitioner. However, the refusal of these three even to consider life without release caused the jury to realize it would be hung. Like Beauregard, Hastings also changed her vote to death under her belief that jury non-unanimity would result in a less-than-life sentence for Jones. Hastings stated that she would not have changed her vote, had it not been for this belief.

The remarks of Beauregard and Hastings made it crystal clear that the specter of a "lesser sentence" -- which, this jury believed, would be imposed by the court as the result of a hung sentencing jury -- had been the driving force behind this jury's decision to sentence Petitioner to death.

This Court held on direct appeal that any problems with the jury instructions as a whole, including the lesser sentence alternative, did not meet the stringent standards for plain error review. 527 U.S. at 384-395. Notably, the issue of whether the inclusion of the lesser sentence alternative, standing alone, constituted reversible error was not before this Court on direct appeal.

527 U.S. at 388 n. 8. That issue was before the Fifth Circuit on direct appeal; that court concluded that although inclusion of the lesser sentence option was error, it did not rise to the level of plain error.

The prejudice standard of *Strickland*, however, requires a very different inquiry than does the determination of "plain error" by an appellate court. The question is whether there is a reasonable probability that a single juror would not have voted for a sentence of death had counsel performed competently.

The record is clear that the answer to that question is yes. Several facts reveal that this was a close and difficult decision for the jurors. First, the jury's findings as to the aggravating factors submitted by the government indicate that the jury's decision was anything but a foregone conclusion. The jury refused to find that Defendant committed the offense after substantial planning and premeditation (Aggravating Factor 2(D)); it refused to find that he knowingly created a grave risk of death to one or more persons in addition to the victim (Aggravating Factor 2(B)); and the jury refused to find that Defendant constitutes a future danger to the lives and safety of other persons (Aggravating Factor 3(A)).

Moreover, there was an extraordinary amount of mitigating evidence in this case -- as powerful and compelling a case in mitigation as the courts ever see in a capital case. Petitioner served his country honorably and courageously for twenty-two years in the United States Army, retiring with an honorable discharge as a Master Sergeant in the Army Airborne Rangers. He served with distinction in two foreign wars and was awarded a Meritorious Service Award and a Commendation Medal. Unlike the typical capital defendant, Petitioner had no criminal record. Jurors also found that his daughter would suffer emotional trauma if her father was executed, and that the Petitioner was both remorseful and would likely be a well-behaved inmate. Moreover, Petitioner had overcome a horrible and traumatic childhood which included regular sexual and

physical abuse, and against overwhelming odds he managed to lead a successful and productive adult life.

The jury deliberated for a day and a half. The two juror affidavits provide a window into how difficult and close the decision was. Indeed, the affidavits reveal the *Simmons*, *Shafer*, and *Kelly* principle at work. Jurors were concerned that if the Petitioner were not sentenced to death (here, as a result of a hung jury) he might get out of prison some day. The jurors' fears of the Petitioner serving less than a life sentence was the most important factor in their decision to sentence the defendant to death. Thus, it is highly probable that the outcome would have been different had the jury not been erroneously instructed about the possibility of a lesser sentence.

Petitioner is well aware that there are strong policy reasons against allowing jurors to impeach their own verdict. We do not contest that juror affidavits are inadmissible to show that jurors misunderstood valid instructions or otherwise failed to follow the instructions they were given. However, this case presents a fundamentally different inquiry: whether there is a reasonable probability that constitutionally deficient actions by defense counsel affected the decision of at least one juror.

This is especially crucial when the stakes are life and death. Under *Strickland*, the reviewing court must determine whether its confidence in the outcome has been undermined. For that inquiry, it is difficult to imagine more pertinent evidence than the juror affidavits in this case. And given the purpose of that inquiry, the policy reasons behind the rule against jurors impeaching their verdict disappear.[4] There is no good reason to turn a blind eye to the available evidence as to what went on in the deliberative process. Given the affidavits, it is simply

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[4]Petitioner also notes that the admissibility of the two juror affidavits was not before this Court on direct appeal. 527 U.S. at 394 n. 11.

impossible to conclude that there is not at least a reasonable probability that the instructional errors caused the verdict to be different.

Because there is a reasonable likelihood that the sentence would have been different but for counsel's deficient performance in requesting the erroneous and misleading instruction, the court below erred in concluding that Petitioner was not entitled to a certificate of appealability of the denial of his § 2255 motion.

II. Should this court reverse the Fifth Circuit's decision that counsel's full and unequivocal confession of Petitioner's guilt on opening statement immediately after entering a plea of not guilty did not violate Petitioner's constitutional Fifth and Sixth Amendment rights?

Defense counsel rendered constitutionally ineffective assistance in conceding his clients guilty during opening statement at the guilt innocence phase of the bifurcated capital trial. The concession was an unequivocal confession of guilt without excuse or justification:

> "I want to say to you at the very outset that Louis Jones does not dispute that he is responsible for the death of Tracie McBride. You will hear no excuses about insanity or self-defense. You will hear no evidence of justification."

Consistent with opening statement, the trial of the guilt innocence phase was anything but an adversarial proceeding. On closing argument there was also no argument advanced that Petitioner was not guilty of capital murder. The rationale for this approach was to "gain credibility" with the jury for the punishment phase.

A. The decision is squarely in conflict with the decisions of other courts of appeal.

The Fifth Circuit recognized that other courts' of appeal decisions appear to be in conflict. The Eleventh Circuit rejected the notion that counsel could concede guilt to maintain credibility with the jury in *Fancis v. Spragins*, 720 F. 2d 1190 (11th Cir. 1983). The Eleventh Circuit quoted from *Young v. Zant*, 677 F. 2d 792 (11th Cir. 1982):

> Although counsel at a capital trial may take steps to evoke jury sympathy prior to the sentencing hearing, again "we can discern no possible reason for [conceding the defendant's guilt] under the present bifurcated procedure." *Id.* at 799.

The Ninth Circuit in *United States of America v. Swanson*, 943 F. 2d 1070 (9th Cir. 1991) held that a defense counsel's concession of guilt on closing argument relieves the Government of its burden of proof in violation of the Fifth Amendment due process protections and the Sixth Amendment right to counsel. In *Swanson* defense counsel told the jury it was his job to hold the government to its burden of proof, much as defense counsel did in this case. The Ninth Circuit recognized that admitting client's guilt is inconsistent with insisting on the strict proof the adversarial system requires.

The rationale used by the Fifth Circuit to justify the deficient performance by counsel was therefore considered and rejected by the other circuits. The Eleventh Circuit says there is no conceivable reason for conceding guilt at the guilt innocence phase in hopes of gaining some sort of credibility at the punishment phase. The Ninth Circuit says concession of guilt is inconsistent with a meaningful adversarial process.

B. The Fifth Circuit opinion is wrong and should not stand.

This court has talked about this problem before in *United States v. Cronic*, 466 U.S. 648 (1984). This court said that the right to effective assistance of counsel requires that counsel act in the role of an advocate and subject the prosecution's case to the "crucible of meaningful adversarial testing."

In footnote 19, the court said "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt." In this case, as in *Swanson* supra, counsel shouldered part of the Government's burden of persuasion.

The Fifth Circuit suggests that all counsel need do is remark in passing that he is holding the government to their proof. Counsel in *Spraggin supra* made the same remark in passing. Saying it is not necessarily doing it.

The decision to plead not guilty is a decision that belongs to the defendant. *Wainwright v. Sykes*, 433 U.S. 72 (1977). There should be no comfort taken in the claim that counsel kept the defendant advised of the strategy. Due process draws the line at requiring the *government* to prove guilt. The client is the client, not co-counsel.

The court should grant the writ especially in view of the continued debate about the *Strickland* test (*Strickland v. Washington*, 466 U.S. 669 (1984)) or the *Cronic* test. See e.g. *Burdine v. Johnson*, 262 F. 3d 336 (5th Cir. 2001). The recent decision of the court in *Bell, Warden v. Cone*, ___ U.S. ___ (No. 01400 decided May 28, 2002) provides substantial guidance for the punishment phase of the capital case. The facts of this case could reaffirm the basic notion that counsel must act as advocate when the client pleads not guilty even in the most difficult cases.

An opinion on this case could highlight the differences in counsel's role in holding the government strictly to its heavy burden of proof and counsel's more elastic role in pleading for mercy. *Bell supra*.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

NO. _____

LOUIS JONES, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PROOF OF SERVICE

I, Floyd Holder, do certify that on this date, June 20, 2002, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The Supreme Court of the United States was served via Federal Express.

The names and addresses of those served are as follows:

Delonia Watson
Assistant U.S. Attorney
801 Cherry St., Suite 1700
Fort Worth, TX 76102-6897

Floyd D Holder

FLOYD D. HOLDER, JR.

APPENDIX A

U.S. COURT OF APPEALS
FILED
MAR 27 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-10142

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

VERSUS

LOUIS JONES,

Defendant - Appellant.

Appeals from the United States District Court
for the Northern District of Texas

Before WIENER, BENAVIDES, and PARKER, Circuit Judges

ROBERT M. PARKER, Circuit Judge

Appellant Louis Jones seeks a Certificate of Appealability ("COA") on the bases of ineffective assistance of counsel (two particulars), racial discrimination stemming from an alleged systematic pattern in the prosecution of death penalty cases by the United States Attorney General's office, and alleged selective prosecution of death penalty cases based on the geographic location of the defendant at the time that the crime was committed. We deny

his application on all issues.

I. BACKGROUND.

Jones, a retired servicemember, was convicted of kidnaping with death resulting to the victim, in violation of 18 U.S.C. § 1202(a)(2), punishable by death under the Federal Death Penalty Act ("FDPA") of 1994, 18 U.S.C. § 3591, *et seq.* Jones directly appealed his conviction and death sentence to this court and to the United States Supreme Court, both of which affirmed his sentences. *See United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), *aff'd Jones v United States*, 527 U.S. 373 (1999). The details of the crime and subsequent history are contained in those cases; a brief summation is all that is necessary for this review.

> Petitioner Louis Jones, Jr., kidnaped Private Tracie Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. He brought her to his house and sexually assaulted her. Soon thereafter, petitioner drove Private McBride to a bridge just outside of San Angelo, where he repeatedly struck her in the head with a tire iron until she died. Petitioner administered blows of such severe force that, when the victim's body was found, the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing.

See 527 U.S. at 376. Having exhausted his direct appeal, Jones sought a COA on collateral attack under 28 U.S.C. § 2255 from the district court, which denied his request. He now seeks such a COA from this court, on the issues as outlined. We have jurisdiction under 28 U.S.C. § 2253.

II. STANDARD OF REVIEW.

To prevail on an application for a COA, a petitioner must make a "substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing that reasonable jurists could debate whether. . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Moore v. Johnson*, 225 F.3d 495, 500 (5th Cir. 2000), quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "Because the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [the petitioner's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

III. ANALYSIS.

A. Ineffective Assistance of Counsel.

Jones makes two claims under the heading of ineffective assistance of counsel ("IAC"). First, he asserts that his trial counsel's admission of Jones's responsibility for McBride's death during his opening statement at trial violated Jones's rights under the Fifth and Sixth Amendments. Second, Jones asserts that a jury charge encompassing the language of 18 U.S.C. § 3593(e), as requested by his trial counsel, violated his rights under the Sixth Amendment.

We review IAC claims under the standard announced in *Strickland v. Washington*, 466 U.S. 669 (1984). The petitioner must show (1) that counsel's representation was deficient, and (2)

actual prejudice resulted from the deficient performance. *Id.* at 687; *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999).

As to Jones's first IAC claim, the issue is whether his counsel's comments regarding Jones's responsibility for Private McBride's death during his opening statement was properly a matter of considered trial strategy. Counsel's opening statement included the following remarks:

"I want to say to you at the very outset that Louis Jones does not dispute that he is responsible for the death of Tracie McBride. You will hear no excuses about insanity or self-defense. You will hear no evidence of justification." The remainder of counsel's opening statement made it clear that the defense strategy was to admit those incontestable issues that the defense could not avoid[1] to the jury, force the government to prove each element of its case, and rely on the presentation of mitigating evidence.[2]

Jones argues that this statement amounts to an admission of guilt to his capital murder charge. He further contends that such an admission amounts to an abandonment of his case by his defense

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[1] *E.g.*, that Jones confessed orally and in writing and that his ex-wife, Sandra Lane, had identified Jones as a possible suspect in the McBride kidnaping/murder after Jones had kidnaped Lane and sexually assaulted her as well.

[2] *E.g.*, that Jones was a 22-year Army combat veteran who had retired with distinction to be with his then-wife, Sandra Lane, during her active duty service, that he had suffered poverty and sexual abuse as a child, that he was a religious man, and that he had mentally suffered as the result of the dissolution of his marriage to Lane.

counsel and is constitutionally infirm.

Jones further asserts that such a statement by counsel in the guilt-innocence phase without his client's consent is ineffective assistance of counsel. He notes, however, that the district court found that he was fully apprised of his counsel's informed strategic decision and that he concurred in its use, without attempting to contradict that finding. The record supports such a finding. Regardless, Jones argues as though his consent had not been obtained and as though his counsel's statement amounted to an "admission of guilt" of the crime charged. The authorities Jones cites to support his position are factually distinguishable from his case and are unconvincing.

The Eleventh Circuit has held that where a capital defendant seeks a verdict of not guilty by his testimony as well as by his plea, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury. *See Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983) (after an opening statement, hearing the prosecution's strong evidence, and having his capital defendant client testify that he denied any knowledge of crimes charged or making exculpatory statements to the police, defense counsel said to the jury at final argument, "I think [the defendant] went in the house and I think he committed the crime of

murder. . ."). That circuit has also held that counsel is ineffective in a capital case when he fails to understand the reason for a bifurcated trial, attempts a wholly unsupported affirmative defense of insanity and then abandons it mid-trial, fails to argue that a lesser included manslaughter offense might be applicable, commits various other blunders during trial, and openly admits his client's guilt for malice murder during closing arguments in the guilt-innocence phase while pleading for mercy from the jury. *See Young v. Zant*, 677 F.2d 792, 796-98 (11th Cir. 1982).

Jones's other authorities are similar. *See, e.g., United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) ("[a] lawyer who informs the jury [in his closing argument] that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing") (internal quotations and citations omitted). *See also Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981) (defense counsel is ineffective when he "surrender[s] the sword" by admitting in his closing arguments that his clients were "guilty as charged by the Commonwealth's Attorney's office" and that the prosecutor "has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime," without his clients' consent).

None of these authorities reflect the facts in Jones's case.

Jones's defense counsel recognized the strength of the prosecution's evidence and decided not to attempt an affirmative defense. He elected to rely on making the prosecution prove each element of the offense and on his ability to negate that proof in one or more elements. He did not put Jones on the stand, where contrary testimony might have been elicited from him. He obtained Jones's informed and knowing consent to pursue this trial tactic. He informed the jury in his opening statement that he would require the prosecution to prove each and every element of the offense charged, that of capital murder. His statement that Jones "[did] not dispute that he [was] responsible for the death of Tracie McBride" and would not be presenting insanity, self-defense, or justification defenses does nothing to undercut that trial tactic. Furthermore, a statement of responsibility for a death is not an admission as to each of the elements of a capital murder charge. Where defense counsel has admitted his client's responsibility for something less than the crime charged, we have held such a decision to be a permissible trial tactic, depending on the circumstances. *Kitchens*, 190 F.3d at 704 (in a capital murder case, pleading guilty to murder and arguing in closing that the defendant had committed a "very brutal, a very savage murder, but [] not a capital murder. . ." was a valid strategic decision to bolster credibility with the jury).

"Informed strategic decisions of counsel are given a heavy

measure of deference and should not be second guessed." *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir.), *cert. denied*, 528 U.S. 1013 (1999). There is nothing in the record to suggest that Jones's counsel blundered through the trial, attempted to put on an unsupported defense, abandoned a trial tactic, failed to pursue a reasonable alternative course, or surrendered his client. "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). There is no hint of unfairness; in this case, counsel's tactic may have been the best available and the record amply reflects that Jones consented to its use.

Regarding Jones's second IAC claim, the issue is tied into the statutory language of § 3593(e), which provides that

> the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release *or some other lesser sentence*.

(Emphasis added). Jones argues that the inclusion of "some other lesser sentence" may have given the jury the impression that, if

the death penalty were not imposed, that some less-than "life imprisonment without possibility of release" sentence might be imposed, which could have influenced them to impose the death penalty.

Strickland requires that we examine whether counsel's assistance was reasonable considering all of the facts of the case as of the time of counsel's conduct. *See Strickland*, 466 U.S. at 688-90 ("[t]hus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). Under existing Supreme Court precedent, due process requires that where a jury is invested with the responsibility to impose a sentence, a defendant has a liberty interest in the jury's being informed of all sentences that the governing statute allows it to impose. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). In that view, because § 3593(e) refers to the possibility of "a lesser sentence," even if the only *actual* available sentences are the death penalty and life imprisonment without possibility of release, it is difficult to infer that counsel's inclusion of or failure to object to that language in this case was ineffective assistance. In contrast, where the government places a capital murder defendant's future dangerousness at issue, as it did in Jones's case, and the only alternative to

the death penalty is life imprisonment without the possibility of release, as it is under federal law, the jury must be so informed. *Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000). Thus, Jones argues, the inclusion of the "lesser sentence" language might lead to a juror's inference that life imprisonment without parole may not be the sole alternative to the death penalty.

To the extent that this quandary could lead to error on counsel's part, Jones suffered no prejudice as a result of it. As we noted previously in his case, the inclusion of that language imposed no prejudice on Jones based on any danger that the jury would believe that a non-unanimous deadlock between death and life without release could result in a "lesser sentence." Because § 3593(e) requires unanimity in the imposition of *any* sentence, any deadlock would have resulted in impaneling a second jury. *See United States v. Jones*, 132 F.3d at 242-43, *aff'd Jones v. United States*, 527 U.S. at 390-91. Similarly, Jones's latest argument on this point is meritless. The district court's jury instruction specifically informed the jury,

> If you recommend the imposition of a death sentence, *the court is required to impose that sentence.* If you recommend a sentence of life without the possibility of release, *the court is required to impose that sentence.* If you recommend that some other lesser sentence be

> imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.

(Emphasis added). The jury had the knowledge that they, and they alone, had the power to impose (1) the death sentence, (2) life without the possibility of release, or (3) some lesser sentence that the court would choose and impose and about which the jury should not be concerned. The only thing that the jury did not know was that if they imposed "some lesser sentence," the district court would have been bound to sentence Jones to life without release. That is immaterial and does not invoke the concern in *Simmons* that a jury, not knowing that the sole alternative to death is life without release, might choose the death penalty out of worry that the defendant may one day wind up back on the street again.

For these reasons, we deny Jones's application for a COA on the subject of ineffective assistance of counsel.

B. Racial Discrimination.

Jones also claims that the death sentence in his case was applied, in part, because of a "systematic pattern of racial discrimination by the Attorney General of the United States," which violated his rights under the Fifth and Eighth Amendments.

To make a substantial showing of the denial of a federal right in this instance, Jones must show that he was treated differently under the FDPA than others who were similarly situated. He has failed to do so.

In his request for a COA in the district court, Jones asserted that he was the victim of general racial discrimination according to a showing of statistics breaking down federal death penalty sentences by race. The district court held that those statistics were insufficient to meet the threshold showing that he was singled out for prosecution under the FDPA but that others similarly situated were not, and that there was no evidence in the record to support a claim of selective prosecution on the part of the government.

Jones has changed his claim on appeal. He now narrows the field of his selective prosecution contention to assert that he is the victim of racial discrimination because, of the six individuals on federal death row as of July 20, 2000, for having committed homicides involving interracial victims, five were black and one was white. He otherwise relies on the same statistical background provided by the federal government. *See* DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988 - 2000), at 6-37 (2000)("the DOJ Report"). Among other portions of the report, Jones specifically cites Part IV, relating the determinations of Janet Reno, the United States Attorney General during all pertinent

periods, and Part V, relating activities after authorization had been granted to pursue the death penalty in the various federal cases. On Jones's unopposed motion, the district court judicially noticed that report in its entirety.

Having only argued the broader statistical issue in the district court, Jones does not have grounds upon which to present a new argument on appeal. To the extent that his current argument is somehow buried within his original position, however, we make the following observations.

For the timeframe Jones cites, 1995 - 2000, the Attorney General authorized 159 total death penalty prosecutions. To reach this end, the Attorney General had submitted 682 potential death penalty cases for review by the combined United States Attorneys. The U.S. Attorneys recommended 183 total prosecutions, which included 48 white, 81 black, 39 Hispanic, and 15 "other" defendants. Those recommendations were made by U.S. Attorneys from 49 of the 94 federal districts. Of the 682 cases submitted to the U.S. Attorneys, 618 had been screened and remained active as of July 20, 2000. The Attorney General's independent Review Committee reviewed each of those 618 cases during the timeframe of the DOJ Report. The Review Committee also recommended 183 death penalty prosecutions, including 47 white, 80 black, 43 Hispanic, and 13 "other" defendants. The Attorney General then reviewed the 588 cases that had completed both reviews within the same report

timeframe. She selected the 159 cases to prosecute, including 44 white, 71 black, 32 Hispanic, and 12 "other" defendants.

We agree with the district court that these statistics are insufficient to meet the threshold requirement that Jones was singled out for prosecution under the FDPA but that others similarly situated were not. "The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (internal quotations and citations omitted). By simply referring to raw statistics, which themselves demonstrate that defendants of white, black, Hispanic, and "other" ethnicity were prosecuted, Jones did not make a substantial showing of the possibility of a denial of a federal right on his broader statistical argument. Despite the narrower assertion he now offers us, he has done no more than repeat his error.

Jones argues that, instead of the racial discrimination standard employed in *Armstrong*, we should look to civil rights cases such as *Whitus v. Georgia*, 385 U.S. 545 (1967), in which the U.S. Supreme Court determined that the then-employed method of

using tax records, in part, to populate juries disproportionately excluded blacks and that the defendants had made a sufficient *prima facie* case by showing the statistical imbalance between the juries and the population demographics. We reject that approach. The Court in that case also had the benefit of having seen the defendants and having addressed the issue of jury composition in their case twice before. *Id.* at 546-47. Also, rather than screening the pool of potential jurors for the performance of a civic duty through mass data bases, such as voter registration or other means, criminal defendants are closely and individually scrutinized on a variety of bases. "The decision to prosecute one person and not another is a proper exercise of executive discretion with which [courts] are reticent to interfere." *United States v. Webster*, 162 F.3d 308, 333 (5th Cir. 1999). As we noted there, the proper inquiry is the two-prong approach of *Armstrong* whereby a petitioner's *prima facie* case must first show that he has been singled out for prosecution but others similarly situated of a different race were not prosecuted. Then, he must demonstrate that the discriminatory selection of him for prosecution is invidious or in bad faith, in that it rests on such impermissible considerations as race, religion, or the desire to prevent his exercise of his constitutional rights. *Id.* at 333-34. While we noted that sufficiently "stark" statistics might open a *prima facie* case, mere statistical evidence of racial disparity is usually *per se*

insufficient to support an inference of any "unacceptable risk" of racial discrimination in the administration of capital punishment. *Id.* at 334. The statistics quoted herein are less stark than those we held insufficient in *Webster*.

To briefly examine Jones's modified claim, of all of the cases considered by the Attorney General, 159[3] involved interracial homicides, in which at least one of the victims was of a different ethnicity from the defendant. Of those 159 cases, 20 white, 87 black, 39 Hispanic, and 13 "other" defendants were involved. Out of these, the Attorney General selected 7 white, 30 black, 9 Hispanic, and 5 "other" defendants to prosecute for the death penalty for a total of 51. Thus the Attorney General selected approximately one-third from each ethnic group except Hispanic, from which she selected about one-fourth. These statistics were also as of July 20, 2000, and reported in the DOJ Report dated September 12, 2000.

Jones cites the DOJ Report for the statistic that of 19 federal defendants on death row as of July 20, 2000, only six had been involved in an interracial homicide. Of those six, five were black and one was white. On that basis, he ascribes former

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[3] By coincidence, the number 159 appears both as the number of interracial homicides out of the 588 reviewed by the former Attorney General and as the total number of cases selected out of the 588 for death penalty prosecution. Those numbers do not reflect the same population. Of the 159 total death penalty prosecutions authorized, only 51 involved interracial homicides.

Attorney General Janet Reno, solely and personally, as having conducted the death penalty authorizations on a discriminatory basis, presumably against black defendants who killed victims with other than black ethnicity. The portion of the DOJ Report Jones relies on, however, relates statistics going back to 1988, before Ms. Reno was appointed. A snapshot statistic of conditions on a single day, without more, is unconvincing, and Jones's assertion that a single actor was responsible and acted with discriminatory intent is unsupported. Further, obviously, the group of 51 death penalty defendants who had been involved in interracial homicides documented in the DOJ Report included an ethnic mix of whites, blacks, Hispanics, and "others" regardless of the racial mix of the six with whom Jones takes issue as of one day in time.

These statistics cannot of themselves meet the threshold requirement of establishing that Jones was singled out for prosecution under the FDPA, whether for an interracial homicide or otherwise, but that others similarly situated were not. *Id.*

We deny Jones's application for a COA on this issue.

C. Geographic Selectivity.

Finally, Jones argues that his death sentence was due, in part, to an arbitrary factor of geography. Essentially, he asserts that, although federal law applies equally throughout the states, federal death penalty cases originate only or primarily from those states, such as Texas, that also have a high propensity to pursue

the death penalty under state law. According to Jones, such "geographic selectivity" of federal law violates his Fifth and Eighth Amendment rights.

His argument is meritless. Of the 19 cases on federal death row as of July 20, 2000, Jones asserts that 13 come from only three states - Texas, Virginia, and Missouri. Those states tend to be high in the rankings of states that prosecute death penalty cases under their own state law.

The 19 cases Jones cites were not prosecuted under state law, however. They represent independent prosecutions in various federal judicial districts, managed under the Attorney General of the United States. Jones presumably asserts that, somehow, being located in a state that imposes the death penalty under state law influences an office of the U.S. Attorney.

The same DOJ Report cited by Jones reports that the 19 defendants were prosecuted in 14 individual cases. Ten of those cases included single defendants and four included two or more. They were prosecuted in 12 judicial districts in 10 states. As we have already observed, for the period 1995 - 2000, U.S. Attorneys in 49 of 94 federal districts recommended death penalty prosecutions. That is much broader than the districts limited to the states that Jones has singled out. Jones has presented nothing to show that any of those states, and Texas in particular, have had any influence on their resident U.S. Attorney's offices as to

whether to prosecute the death penalty or to refrain from such prosecution.

We deny Jones's application for a COA on this issue.

IV. CONCLUSION.

For the reasons stated above, Jones has not made a substantial showing of the denial of a federal right and we therefore deny his application for a certificate of appealability on these four issues.

APPENDIX B

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
DEC 12 2000
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

LOUIS JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 5:00-CV-273-C
(Criminal No. 5:95-CR-047-C)

ENTERED ON DOCKET
DEC 12 2000
U.S. DISTRICT CLERK'S OFFICE

ORDER

Came on for hearing the Motion for New Trial or to Vacate Defendant's Death Sentence Under 28 U.S.C. § 2255 filed in the above-styled and -numbered cause. Both parties appeared and announced ready.

After considering the record, the evidence, and the arguments of counsel, and based upon the undersigned judge's recollection of the trial and related proceedings, the Court makes the following findings and conclusions:

1. Louis Jones was convicted in the United States District Court for the Northern District of Texas of kidnapping with death resulting, in violation of 18 U.S.C. § 1201(a)(2), and was sentenced to death upon the recommendation of the jury.

2. Jones was the first defendant in the country to be tried for, and sentenced to, the death penalty under the Federal Death Penalty Act (FDPA).

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Certified a true copy of an instrument
on file in my office on 4-18-01
Clerk, U.S. District Court,
Northern District of Texas
By _____ Deputy

3. His conviction and sentence were affirmed by the United States Court of Appeals for the Fifth Circuit in a published opinion. *See United States v. Jones*, 132 F.3d 232 (5th Cir. 1998).

4. The Supreme Court granted Jones's petition for writ of certiorari limited to the following questions:

> (1) whether Jones was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation would automatically result in a court-imposed sentence of life imprisonment without possibility of release;
>
> (2) whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment; and
>
> (3) whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

See Jones v. United States, 525 U.S. 809, 119 S. Ct. 39 (1998).

5. Upon review, the Supreme Court affirmed Jones's conviction and sentence. *See Jones v. United States*, 527 U.S. 373, 119 S. Ct. 2090 (1999).

6. As part of its review process, the Supreme Court made a determination that jury instructions setting forth the three sentencing options provided for in 18 U.S.C. § 3593(e) did not create a reasonable likelihood that the jury believed a deadlock would cause the district court to impose a lesser sentence.

7. The Supreme Court denied Jones's petition for rehearing on August 23, 1999. *See Jones v. United States*, 527 U.S. 1058, 120 S. Ct. 22 (1999).

8. No execution date has been scheduled.

9. Jones filed his initial motion for relief pursuant to 28 U.S.C. § 2255 on August 12, 2000. The Government filed its response on October 16, 2000.

10. Jones was initially represented by Mr. Carlton McLarty, an Assistant Federal Public Defender, and by Mr. Steven L. Woolard, Attorney at Law—both of whom were appointed by the Court. Mr. Woolard was eventually discharged of his responsibilities. Mr. Daniel Hurley, Attorney at Law, was then appointed to represent Jones. Mr. McLarty and Mr. Hurley represented Jones at trial.

11. Both Mr. McLarty and Mr. Hurley are experienced trial attorneys.

12. No later than early June of 1995, Jones's defense counsel began an intensive search to locate mental health and medical experts to examine and evaluate Jones for the purpose of discovering and presenting possible mitigating evidence. Several mental health and medical experts examined and evaluated Jones prior to the defense counsel's selection of experts to testify at trial.

13. After a pretrial hearing, this Court denied defense counsel's motions to suppress incriminating statements given by Jones to law enforcement agents and evidence seized pursuant to warrant-authorized searches and Jones's arrest.

14. Jones's defense counsel made an informed strategic decision to concentrate their efforts on persuading the jury that life without the possibility of release was the appropriate punishment for Jones's crime rather than the death penalty.

15. As part of this strategic decision, and given the overwhelming evidence of guilt and the weight of mitigating evidence, defense counsel elected to acknowledge Jones's culpability for the murder and kidnapping in order to maximize credibility with the jury on the issue of the proper punishment.

16. Jones was fully apprised of this strategy by defense counsel and concurred in its use.

17. Defense counsel consistently introduced mitigating evidence throughout both the guilt-innocence and the punishment phases of the trial.

18. Defense counsel presented 20 witnesses—including military personnel, family members, co-workers, an ex-wife, a minister, and Jones's jail guards—in the penalty phase of the trial who testified favorably to Jones's military career, family background, employment since retirement, genuine remorse, and religious experiences, and in support of his mitigating factors.

19. Defense counsel presented hours of expert testimony and tests results in support of Jones's mitigating evidence.

20. Defense counsel did not abdicate their roles as advocates for Jones.

21. In his motion, Jones fails to explain, as required by case law, how different actions on the part of his defense counsel would have made a difference in his conviction. He points to no specific objections that defense counsel could have made to the government's exhibits which would have prevented this Court from admitting the exhibits. He fails to

identify what questions his attorneys should have asked of the government's itnesses that they failed to ask and the specific impact of that failure.

22. Prior to his examination, Dr. Mark Cunningham told Jones that his findings after the evaluation might or might not be favorable to Jones. He also told Jones that if the results were unfavorable to him, Dr. Cunningham assumed that defense counsel would not call him as a witness. Jones was also told that, if called, Dr. Cunningham "would testify regarding the findings of my interview and my impressions regardless of whether those were helpful to him."

23. Dr. Mark Cunningham informed defense counsel that he would need to know Jones's version of the offense in order to render an opinion as an expert witness as to certain matters.

24. Defense counsel made an informed strategic decision to call Dr. Mark Cunningham as an expert witness on the issue of mitigation despite the damaging information provided by Jones to Dr. Cunningham.

25. Defense counsel consulted with Jones regarding their decision to call Dr. Cunningham, and Jones concurred in the decision.

26. Defense counsel conducted a probing technical cross-examination of each of the government's expert witnesses. Jones failed to explain how his defense counsel could have more effectively challenged the government's rebuttal evidence.

27. At the time of Jones's trial, the law was unsettled on the issue of whether a jury should be instructed on the three sentencing options set forth in 18 U.S.C. § 3593(e).

11 - 7

28. The indictment alleged that, as the result of a kidnapping, the death of Tracie Joy McBride resulted.

29. The jury was instructed that in order to find Jones guilty of the offense of kidnapping, it had to be convinced that the government had proved beyond a reasonable doubt the following:

> First: that the defendant, knowingly acting contrary to law, kidnapped, seized, confined, inveigled, and abducted the person described in the indictment, Tracie Joy McBride, as charged;
>
> Second: That the defendant held such person for ransom, reward, or some benefit that the defendant intended to derive from the kidnapping;
>
> Third: That the defendant intentionally committed such act within the special maritime and territorial jurisdiction of the United States, that is, Goodfellow Air Force Base; and
>
> Fourth: That the death of Tracie Joy McBride resulted.

30. The recitation in the record (R. 2:502) which reflects that the Court found Cassandra Hastings to be disqualified to serve as a juror is an error in transcription.

31. Jones makes no allegation of newly discovered evidence in support of his motion for new trial.

Based upon the above findings, the Court makes the following conclusions of law:

1. This Court has jurisdiction over Jones's motion for post-conviction relief, which was timely filed on August 12, 2000.

2. Jones's defense counsel were not ineffective where they made a reasoned strategic choice to concede Jones's guilt on the kidnapping and murder in order to gain

credibility with the jury to argue that the mitigating evidence justified a sentence of life imprisonment rather than the death penalty.

3. Given the indisputable evidence of Jones's guilt, there is no reasonable likelihood that the jury would have reached a different decision if his trial counsel had elected to deny Jones's culpability as to the kidnapping and murder charges in the guilt-innocence phase of the trial. *See Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984).

4. Jones's defense counsel were not ineffective in their presentation of expert mitigating evidence or in their response to the government's rebuttal evidence.

5. Because of the unsettled state of the law, Jones was not denied effective assistance of counsel where his defense counsel failed to object to a jury instruction that set forth the three sentencing options listed in 18 U.S.C. § 3593(e) and, in fact, requested the inclusion of such instruction.

6. Defense counsel made an informed strategic decision to request that the jury be instructed on all of the sentencing options set forth in 18 U.S.C. § 3593(e).

7. Because Jones was not prejudiced by the inclusion of the third sentencing option—"some other lesser sentence"—in the jury charge, he cannot make the requisite prejudice showing on his claim of ineffective assistance of counsel.

8. Defense counsel was not ineffective where they made a strategic decision to offer expert witness testimony from Dr. Cunningham based on their reasoned decision that its positive benefit outweighed its negative impact.

9. Jones was not deprived of his Fifth Amendment privilege against self-incrimination.

10. Jones was not denied his constitutional right to effective assistance of counsel.

11. Pursuant to the Fifth Circuit's opinion on direct review, there is no merit to Jones's claim that the government was required to prove that Tracie McBride was killed within the special maritime or territorial jurisdiction of the United States in order to make him eligible for the death penalty.

12. The trial court had subject matter jurisdiction over the criminal offense.

13. The Supreme Court's decisions in *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), and *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), have no impact on the Court's jurisdiction over the offenses for which Jones was indicted, tried, and convicted.

14. Any requirements that *Apprendi* and *Jones* may have imposed were satisfied in the instant case where "if the death of any person resulted" was charged in the indictment, submitted to the jury, and proved to the jury's satisfaction beyond a reasonable doubt.

15. Cassandra Hastings was properly impaneled as a juror.

16. Jones was not denied his right to an impartial jury.

17. The statistics set forth by Jones in support of his claim of racial discrimination are insufficient to overcome the threshold showing that he was singled out for prosecution under the Federal Death Penalty Act (FDPA) but that others similarly situated were not.

18. Jones fails to provide sufficient support for his claim that he was subjected to the arbitrary and capricious imposition of the death penalty as a result of his offense having occurred in Texas.

19. There is no evidence in the record that the government engaged in a systematic pattern of racial discrimination in its determination of which defendants should be prosecuted under the FDPA.

20. Jones has failed to show both "cause" for his failure to raise his claims of racial and geographical discrimination before this Court and on direct appeal and "actual prejudice" resulting from the alleged errors. *See United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc); *United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594 (1982).

21. Jones's claim that the Fifth Circuit's review on direct appeal was inadequate is not cognizable in a proceeding pursuant to section 2255, which is reserved for challenges of constitutional dimension. *See United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994).

22. This Court is without authority to address issues for which Jones claims the Fifth Circuit's review on direct appeal was inadequate.

23. To the extent that Jones moves for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, this Court is without jurisdiction to entertain it because the seven-day post-verdict window for filing a motion for new trial based on any ground other than newly discovered evidence expired long ago. *See* Fed. R. Crim. P. 33; *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982); *United States v. Granza*, 427 F.2d 184, 186

(5th Cir. 1970); *Herrera v. Collins*, 506 U.S. 390, 409, 113 S. Ct. 853, 865 (1993) (Rule 33 time limits are strictly construed).

For the foregoing reasons, Jones's motion for post-conviction relief and his motion for new trial are denied.

SO ORDERED.

Dated this 12th day of December, 2000.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

APPENDIX C

Ex. A

AFFIDAVIT

I, DANIEL SALAZAR, do hereby state the following:

My name is DANIEL SALAZAR. I am employed as an Investigator for the Federal Public Defender.

On November 8, 1995, a juror in the Louis Jones case called the office of the Federal Public Defender. The caller identified herself as juror Christie Beauregard. With the consent of the juror, she was placed on speakerphone and Daniel Salazar and Carlton McLarty participated in the conversation.

The juror expressed misgivings about the verdict.

She said that she'd been the next to last to change her mind. She described the initial vote as eight to four for the death penalty. She said the main thing that bothered her was that there was a lot of confusion about the Court's instructions. On Friday afternoon they thought they would be hung because they were not able to reach a unanimous verdict. They understood the instructions to mean that they had to be unanimous on both death and life without parole. The people who were 100% for the death penalty would not agree to sign off on the life without parole form.

During deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.

She stated that there was considerable pressure in deliberations to prevent that outcome.

She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release.

They were taking secret ballots. When it got down to ten to two the other jurors asked who were the two that weren't voting for death and put them on the spot. She said that she hadn't decided. She thought that Louis would be okay in prison. But she also said that if she was the only one then she might change her mind but as long as there was someone else agreeing with her then she would not vote for the death penalty.

She said that at this point Cassandra Hastings, the lone black juror, began crying and stating that she could not impose the death penalty. Mrs. Beauregard then describes all the other jurors as "getting on her". That they were "pushing her hard" and that they were pressuring her until she finally said 'yes'. After that Mrs. Beauregard then changed her vote.

She said shortly before it reached this point they had almost

decided it would be a hung jury and they were about to send a note out to the Judge asking for clarification about the instructions and what would happen if there was a hung jury. However, at this point the ten to two vote occurred and things went very fast from that point on.

She said some of the pro death jurors would have been willing and were willing to go along with life without possibility of release. She says that if the jury had known that if they were unable to reach a verdict between life without possibility of release and death that the Judge would have imposed a life without possibility of release sentence then she would not have agreed to vote for a death sentence. She believed other jurors shared that view.

DANIEL SALAZAR

THE STATE OF TEXAS
COUNTY OF LUBBOCK

This instrument was acknowledged before me on Dec 28, 1995 by DANIEL SALAZAR.

Notary Public, State of Texas

DORA M. RUSSELL
MY COMMISSION EXPIRES
October 20, 1997

APPENDIX D

STATE OF TEXAS *
* AFFIDAVIT
COUNTY OF LUBBOCK *

BEFORE ME, the undersigned authority, on this day personally appeared CASSANDRA HASTING, a credible person, of legal age, who, after being duly sworn by me on her oath states the following:

My name is Cassandra Hastings. I served as a juror in the trial of United States v. Louis Jones.

I have contacted the office of Dan Hurley, Attorney, in order to inform him of matters relating to the deliberations in the trial of Mr. Jones. I contacted Mr. Hurley's office after I heard news accounts of another jurors' statements about our deliberations. I discussed the case with Mr. Hurley, then I called him back again. and then I visited him at his office. This affidavit was prepared in his office and I have carefully reviewed it for accuracy.

During the course of our deliberations we were confused as to the meaning of the courts instructions. Initially, no one knew exactly what would happen if we were unable to reach a verdict. This issue came up on the first day of deliberations.

Once we reached the point in our deliberations where we discussing the punishment our initial vote was 8 to 4 for the death penalty. I was one of the jurors who did not want to impose a death sentence, but instead I favored Life without possibility of release. Many of the other jurors were willing to impose a Life without release sentence. In fact, it is my recollection that all but three jurors were willing to vote to impose Life without release. However, the other three jurors were firm in their opposition to Life without release. It looked like we might have had a hung jury. At this point we again discussed the effect of a hung jury.

One of the men. I believe it was Mr. Carthel from Plainview. said that if we had a hung

jury then the sentence would be left up to the judge and that Louis Jones would get the lesser sentence referred to in the last jury verdict form. People then brought up the possibility that Mr. Jones could be released from prison. No one wanted this to happen or even be possible.

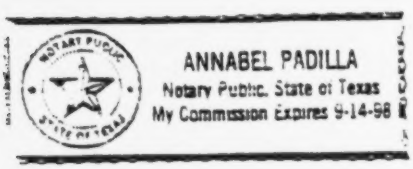
I feel that a great deal of pressure was brought to bear on me to get me to change my vote. This pressure included the information that the judge would impose a lesser sentence than Life without release if we didn't reach a verdict.

I would not have changed my vote to a death sentence if I had known that a hung jury would not result in the defendant being released from prison at a later. I do not feel that the death sentence is the appropriate sentence in this case and I changed my vote because of the intense pressure from other jurors and the information that Mr. Jones would get a sentence that would result in his release from prison if we had a hung jury.

Cassandra Hastings

CASSANDRA HASTINGS

SUBSCRIBED AND SWORN TO before me by the said CASSANDRA HASTINGS on this the 19th day of January, 1996 to certify which witness my hand and seal of office.



Annabel Padilla

Notary Public, Lubbock County, Texas

Supreme Court, U.S.
FILED
OCT 9 2002
CLERK

No. 01-10925

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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QUESTIONS PRESENTED

Whether, in this capital case, trial counsel provided petitioner with ineffective assistance because (1) he conceded during opening argument at the guilt phase of the trial that petitioner was responsible for committing the charged offenses, and (2) he requested and received an instruction at the penalty phase that misstated the sentencing options available to the jury.

IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS JONES, JR., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 287 F.3d 325. The opinion of the court of appeals on direct appeal is reported at 132 F.3d 232. The opinion of this Court affirming the judgment on direct appeal is reported at 527 U.S. 373.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2002. The petition for a writ of certiorari was filed on June 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1202(a)(2). He was sentenced to death. The United States Court of Appeals for the Fifth Circuit affirmed. 132 F.3d 232. This Court granted petitioner a writ of certiorari and affirmed the judgment of the court of appeals. 527 U.S. 373. Thereafter, petitioner filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. The district court denied the motion and declined to issue a certificate of appealability. Pet. App. B1-B10. Petitioner then applied to the court of appeals for a certificate of appealability under 28 U.S.C. 2253(c)(1)(B), and the court of appeals denied the application. Pet. App. A1-A19.

1. Petitioner kidnapped Private Tracie McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. Army Prvt. Michael Peacock witnessed the kidnapping and tried to prevent it, but petitioner struck him on the head with a handgun and left him bloodied and unconscious. 527 U.S. at 376; Pet. App. A2; 16 R. 883-884, 900-902, 904-908; 23 R. 2310.[1]

Petitioner then brought McBride to his house where he sexually assaulted her. 527 U.S. at 376; Pet. App. A2. After the sexual assault, petitioner forced McBride into his bedroom closet, where he tied her up with white nylon rope and used two socks to

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[1] Citations to "R." refer to the record in the criminal trial.

gag her. 16 R. 957; 23 R. 2319-2320. While McBride was in the closet, petitioner was visited by a friend, Margaret Rodriguez, towards whom he made sexual advances. 17 R. 1010-1014.

After Rodriguez left, petitioner decided to kill McBride because she had heard Rodriguez mention his name. 16 R. 957. After forming that plan, petitioner washed McBride's clothes and made her clean herself to remove evidence of the rape. 21 R. 2030-2031; 23 R. 2325. Petitioner then made McBride walk out of the house on towels that he had placed on the floor, because he believed that, if she did so, no fibers from his residence would be on her clothes or boots. 23 R. 2328.

Petitioner forced McBride into his car and drove to a bridge in a remote location 20 miles outside of San Angelo. 527 U.S. at 376; Pet. App. A2; 132 F.3d at 237. Petitioner struck McBride on the head several times while she was still in the car. 16 R. 957-958. McBride apparently had not yet lost consciousness, and petitioner led her under the bridge. 16 R. 958. There, petitioner struck her again until she fell, and he continued to strike her several more times after she was down, shattering her skull and killing her. Ibid. Petitioner administered blows of such force that, when McBride's body was found, the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing. 527 U.S. at 376; Pet. App. A2.

While in state custody for the abduction and sexual assault of Sgt. Sandra Lane, his ex-wife, and after receiving his Miranda warnings, petitioner gave oral and written statements in which he

admitted to the abduction and murder of McBride. Thereafter, petitioner led law enforcement officers to McBride's body, which he had left under the bridge where he murdered her. 132 F.3d at 237.

2. a. In preparation for trial, defense counsel conducted "an intensive search to locate mental health and medical experts to examine and evaluate [petitioner] for the purpose of discovering and presenting possible mitigating evidence." Pet. App. B3. Counsel also sought unsuccessfully to suppress the statements that petitioner made admitting his guilt of the murder as well as incriminating evidence seized by the police. Ibid.

b. At trial, defense counsel remarked during his opening statement that "I want to say to you at the very outset that [petitioner] does not dispute that he is responsible for the death of Tracie McBride. You will hear no excuses about insanity or self-defense. You will hear no evidence of justification." See Pet. App. A4. The remainder of counsel's opening statement made it clear that the defense strategy was to admit those facts that it could not plausibly contest (e.g., that petitioner had confessed to the abduction and murder, and that his ex-wife had identified him as a possible suspect after he had kidnapped and sexually assaulted her as well); force the government to prove each element of its case; and rely on the presentation of mitigating evidence. Id. at A4 & nn. 1-2. Counsel consistently introduced mitigating evidence throughout both the guilt and penalty phases of the trial. Id. at B4. Counsel had informed petitioner of his proposed concession, and petitioner had concurred in counsel's strategy. Id. at A5.

c. After the jury found petitioner guilty, a special jury sentencing hearing was held in accordance with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. Under the FDPA, before the jury may sentence a defendant to death, the jury must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2), to ensure that the defendant acted with the degree of culpability sufficient to justify the death penalty. In addition, the jury must find the existence of at least one aggravating factor enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may consider any non-statutory aggravating factors for which notice has been given, and it may weigh all aggravating factors it has found against any mitigating factors that any individual juror finds to exist. See 18 U.S.C. 3593(c) and (d). The jury may impose the death penalty if it concludes that all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of any mitigating factor, that the aggravating factors are alone sufficient to justify a death sentence. See 18 U.S.C. 3593(e).

Pursuant to defense counsel's request, the district court instructed the jury at the sentencing hearing that, based on its weighing of the aggravating factors found to exist and any mitigating factors found to exist, it must "by unanimous vote, * * * recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release,

or sentenced to some other lesser sentence." 132 F.3d at 244. The court further instructed the jury as follows:

> If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide.

Ibid.

Regarding the intent element, the jury found that petitioner intentionally killed McBride and intentionally inflicted serious bodily injury that resulted in her death. 132 F.3d at 238. The jury then found two statutory aggravating factors: that petitioner caused McBride's death during his commission of the crime of kidnapping, and that he killed her in an especially heinous, cruel and depraved manner. Ibid. The jury also found two non-statutory aggravating factors: McBride's young age, slight stature, background, and unfamiliarity with San Angelo; and her personal characteristics and the effect of her death on her family. Ibid. After weighing the aggravating factors against the ten mitigating factors found by one or more jurors, the jury returned a unanimous sentence of death. 132 F.3d at 238-239.

3. On direct appeal, petitioner contended, among other things, that the district court should have given his proposed jury instruction that a failure to reach a unanimous verdict recommending the death penalty would automatically result in a

sentence of life without the possibility of release, and that the court erroneously instructed the jury that it could sentence petitioner to a prison term of less than life without possibility of release. See 132 F.3d at 243-248.

The court of appeals held that petitioner's proposed instruction about the implication of the jury's failure to reach a unanimous verdict was incorrect, because life without the possibility of release is not the "default penalty" in the event of deadlock. 132 F.3d at 243. Rather, in the court's view, the failure to reach a unanimous verdict would result in a "hung jury with no verdict rendered." Ibid. The court further explained that federal courts have never been "affirmatively required" to give such an instruction. Id. at 245. The court concluded that "no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict." Ibid. The court rejected petitioner's contention that "the instructions given by the district court could lead a reasonable jury to believe that the failure to reach a unanimous decision would result in the imposition of a lesser sentence." Id. at 246. In so doing, the court rejected, as precluded by the rationale of Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits purporting to show that jurors in fact were confused by the instructions. 132 F.3d at 245-246.

The court of appeals also rejected petitioner's claim that the district court committed plain error in allowing the jury three

sentencing options - death, life imprisonment without release, or some other lesser sentence. 132 F.3d at 246-248. After examining the "disparate sentencing options" described in the FDPA, 18 U.S.C. 3593(e), which provides for all three possibilities, and the kidnapping statute, 18 U.S.C. 1201, which provides only for death or life without release, the court concluded that the kidnapping statute "took precedence over the death penalty sentencing provisions." 132 F.3d at 248. Accordingly, the court agreed with petitioner that, if the jury had recommended "some lesser sentence," the court would have been obligated to impose life without possibility of release as the only authorized sentence of imprisonment. Ibid. Nevertheless, the court declined to find that the erroneous "lesser sentence" instruction constituted plain error because no "clearly established law" resolved the issue, so the error was not "obvious, clear, readily apparent or conspicuous." Ibid.

4. Petitioner filed a petition for certiorari, which this Court granted. 525 U.S. 809. One of the issues before the Court was whether the jury was led to believe that, if it could not reach a unanimous sentence recommendation, the district court would impose a sentence less severe than life imprisonment without release, so that petitioner's proposed instruction on the consequences of deadlock was necessary to correct the jury's impression. 527 U.S. at 384. The Court reversed the holding of the court of appeals that any jury deadlock on whether to recommend a sentence of death or life without the possibility of release

would necessitate the impaneling of a second jury; rather, the Court agreed with petitioner that, if the jury could not reach a unanimous sentencing verdict, then the district court was required to impose a sentence of life without the possibility of release. 527 U.S. at 380-381; id. at 417-418 (Ginsburg, J., dissenting).

Nevertheless, the Court rejected petitioner's argument that the jury was led to believe that the court would impose a lesser sentence in the event of deadlock. 527 U.S. at 387-394. The Court applied the plain error standard, because petitioner had failed to object to the instruction on the jury's sentencing options or to the verdict forms corresponding to those instructions, id. at 387-389, but the Court concluded that no "error occurred" (id. at 390). The Court explained that the district court did not expressly inform the jury that it would impose a lesser sentence; rather, it stated that, if the jury recommended a lesser sentence, the court would impose a sentence "authorized by law." Id. at 390. The Court also pointed out that the instructions did not require the jury to select the "lesser sentence" option if it could not reach agreement; instead, the instructions exhorted the jury to reach agreement. Id. at 390-391. The Court concluded that the instructions as a whole, which repeatedly required that any sentencing recommendation be unanimous, did "not create a reasonable likelihood that the jury believed that deadlock would cause the District Court to impose a lesser sentence." Id. at 392.

The Court further held that any error in the instruction did not affect petitioner's substantial rights in light of (1) the district court's admonition to the jury not to concern itself with the effect of a "lesser sentence" recommendation (527 U.S. at 394), and (2) the fact that it was "just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence," so that any jury confusion about the effect of deadlock would not necessarily have worked to petitioner's disadvantage (ibid.).

The Court noted that petitioner urged the Court to consider two affidavits prepared after the jury had returned its sentencing recommendation. 527 U.S. at 394 n.11. The Court explained that the Fifth Circuit had ruled that petitioner could not rely on the affidavits to undermine the jury's sentencing recommendation. Ibid. (citing 132 F.3d at 245-246). Because petitioner did not raise that independent determination in any of his questions presented, and the issue was not fairly included within any of the questions presented, the Court "decline[d] review of this ruling by the Fifth Circuit." Ibid.

5. Petitioner subsequently filed a motion asking the district court to vacate his conviction and sentence under 28 U.S.C. 2255 on the ground that defense counsel provided him with ineffective representation at both the guilt and penalty phases of his trial. Specifically, petitioner argued that trial counsel was unconstitutionally deficient in conceding petitioner's responsibility for McBride's death during his opening statement at

the guilt phase and in requesting the erroneous instruction at the penalty phase that allowed the jury to recommend a lesser sentence than life without possibility of release.

The district court rejected both claims. Pet. App. B1-B10. The court concluded that counsel made a "reasoned strategic choice to concede [petitioner's] guilt * * * in order to gain credibility with the jury to argue that the mitigating evidence justified a sentence of life imprisonment rather than the death penalty." Pet. App. B6-B7. The court also found that, given the "indisputable" evidence of guilt, there was no reasonable likelihood that the result of the trial would have been different if counsel had elected to deny petitioner's culpability. Id. at B7.

Likewise, the district court concluded that counsel made an "informed strategic decision" to request that the jury be instructed as to all three sentencing options prescribed by Section 3593(e)." Pet. App. B7. The court explained that, at the time of the trial, the law was unsettled on whether a lesser sentence was in fact an option available to the jury. Id. at B5. The court also found that the inclusicn of the "lesser sentence" option in the instructions did not prejudice petitioner. Id. at B7. The court denied petitioner's request for a certificate of appealability. See id. at A2.

6. Petitioner then sought a certificate of appealability on the same grounds from the court of appeals. Pet. App. A1. The court rejected the request. Id. at A1-A19. The court held, first, that defense counsel's concession in the opening statement did not

constitute ineffective assistance. In so doing, the court observed that an admission of "responsibility" for a death is not tantamount to an admission of every element of the charged offense, and that counsel told the jury that he would require the prosecution to prove each element of the capital murder charge. Id. at A7. The court concluded that the concession "may have been the best [tactic] available and [that] the record amply reflects that [petitioner] consented to its use." Id. at A8.

With respect to petitioner's objection to counsel's requested instruction on the available sentencing options, the court of appeals observed that "because § 3593(e) refers to the possibility of a 'lesser sentence,' even if the only actual available sentences are the death penalty and life imprisonment without possibility of release, it is difficult to infer that counsel's inclusion of or failure to object to that language * * * was ineffective assistance." Pet. App. A9. The court also concluded that, even if counsel committed error, "[p]etitioner suffered no prejudice as the result of it." Id. at A10. Referring to its earlier holding on direct appeal, the court stated that there was "no danger that the jury would believe that a non-unanimous deadlock between death and life without release could result in a 'lesser sentence.'" Ibid. The court also reiterated its earlier holding that jury deadlock would have resulted in the impaneling of a second jury, which the court apparently mistakenly believed had been affirmed by this Court. Ibid. The court further reasoned that there was no danger that the jury might have chosen the death penalty out of concern

that petitioner might one day be returned to the streets because the jury knew "that they, and they alone, had the power to impose * * * life without the possibility of release" as an alternative to death. Id. at A11.

ARGUMENT

1. Petitioner contends (Pet. 15-19) that the court of appeals erred in refusing him a certificate of appealability on his claim that his trial counsel provided constitutionally ineffective assistance by conceding in his opening statement that petitioner was responsible for McBride's death. To merit a certificate, petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffectiveness of counsel, petitioner must show that counsel's representation fell below an objective standard of reasonableness (id. at 687-688) and that there is a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different (id. at 694). The courts below correctly concluded that petitioner failed to make a "substantial showing" that counsel's concession constituted ineffectiveness under the Strickland test.

This Court has recognized that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. A defendant seeking to establish ineffectiveness of counsel must overcome the "strong presumption" that the challenged actions "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Representation is not unconstitutionally deficient merely because, with the benefit of hindsight, a court may disagree with counsel's informed choices. See Strickland, 466 U.S. at 689. To the contrary, the "strategic choices [of counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

As both the district court and the court of appeals concluded, the concession by petitioner's counsel was an "informed strategic decision[]" and a "permissible trial tactic" to which petitioner gave his "informed and knowing consent" and which "may have been the best available." Pet. App. A7-A8; see id. at B3-B6. Defense counsel, "experienced trial attorneys" (id. at B3), were faced with "overwhelming evidence of [petitioner's]" guilt (id. at B4), including petitioner's oral and written confessions, his knowledge of the remote location of McBride's body, and Peacock's testimony identifying petitioner as the man he had seen with McBride immediately after her abduction. Counsel sought to suppress petitioner's confessions and much of the incriminating evidence, but the evidence was found admissible. Id. at B3. Nor did counsel have available any tenable defense of insanity, self-defense or justification. Indeed, petitioner does not suggest any plausible defense theory that counsel could have pursued at the guilt phase.

Given the indisputable evidence of guilt, if counsel had denied petitioner's responsibility for the charged crimes, he would have risked forfeiting any credibility in the eyes of the jury at the penalty phase. That loss of credibility would have undermined

counsel's ability to present the significant evidence in mitigation that they had amassed. Instead, counsel made a reasonable strategic decision, with petitioner's informed consent, to forgo an unrealistic attempt to deny petitioner's culpability, in the hope of enhancing the credibility of the defense case in mitigation and possibly saving petitioner's life. See Pet. App. A7-A8, B3-B4, B6-B7. At the same time, counsel conducted "an intensive search to locate" mitigating evidence (id. at B3) and "consistently introduced mitigating evidence throughout both the guilt-innocence and the punishment phases of the trial" (id. at B4). The reasonableness of the defense strategy is supported by the fact that one or more jurors found ten of the 11 mitigating factors submitted by the defense, relating to such matters as petitioner's criminal record, his military service, his abuse as a child, his remorse, the impact of his execution on his daughter, and his mental and psychological state at the time of the offenses. See 527 U.S. at 411 n.12 (Ginsburg, J., dissenting). Thus, counsel "did not abdicate their role as advocates for [petitioner]" but made "an informed strategic decision." Pet. App. B3-B4. Cf. Carter v. Johnson, 131 F.3d 452, 466 (5th Cir. 1997) ("counsel may make strategic decisions to acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty in order to establish credibility with the jury"), cert. denied, 523 U.S. 1099 (1998).

Petitioner also was not prejudiced by counsel's concession. As the district court concluded, petitioner "fails to explain * *

* how different actions on the part of his defense counsel would have made a difference in his conviction." Pet. App. B4. "Given the indisputable evidence of [petitioner's] guilt, there is no reasonable likelihood that the jury would have reached a different decision if his trial counsel had elected to deny [petitioner's] culpability as to the kidnapping and murder charges in the guilt-innocence phase of the trial." Id. at B7. Therefore, petitioner cannot show the prejudice required by Strickland. See Basden v. Lee, 290 F.3d 602, 616 (4th Cir. 2002).

The cases on which petitioner relies (Pet. 16) do not help him. In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985), the defendant was convicted of murder and rape and sentenced to death. Although the defendant took the stand and denied any knowledge of the crime, his counsel stated in closing argument that the defendant was guilty, and, instead of urging acquittal on the ground of insanity, suggested that his client deserved life imprisonment because he was feebleminded and under the influence of alcohol and drugs at the time of the crime. Id. at 1193 & n. 7. Counsel's purpose in taking this tack was to "win sympathy" from the jury and "to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury." Id. at 1194. The court of appeals held that the concession rendered counsel's representation ineffective under the Sixth Amendment. Id. at 1194-1195.

This case is significantly different from Spraggins. First, far from taking the stand and denying guilt, petitioner agreed to

counsel's strategic decision to concede his responsibility for the crime at the outset of the trial. There is no indication in Spraggins that the defendant agreed to counsel's concession; to the contrary, the court characterized the concession as an improper expression of counsel's "personal opinion." 720 F.2d at 1194. In a subsequent capital case, LoBosco v. Thomas, 928 F.2d 1054, 1056-1057 (11th Cir. 1991), the Eleventh Circuit, distinguishing Spraggins, held that a similar concession by defense counsel did not constitute ineffective assistance because the defendant consented to the strategy. See also Felker v. Thomas, 52 F.3d 907, 911 (11th Cir. 1995), cert. denied, 516 U.S. 1133 (1996).

Second, while the Spraggins court stated that the evidence against the defendant was "strong" (720 F.2d at 1194), there is no discussion in the opinion of the nature of that evidence, so it is unclear whether there was any room for counsel to make a plausible argument in his client's defense. Here, as the district court expressly found (Pet. App. B7), the evidence of petitioner's guilt, including his confessions, was so overwhelming that a successful defense at the guilt phase was virtually impossible. See Magill v. Dugger, 824 F.2d 879, 888 (11th Cir. 1987) (distinguishing Spraggins on ground that the defendant there did not confess to the crime).

Finally, Spraggins predated Strickland, and the court applied a relaxed standard of prejudice requiring only that counsel's deficiency "caused 'actual and substantial disadvantage' to the conduct of [the defense]." 720 F.2d at 1194, 1195 (quoting Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. Unit B 1982)

(en banc), rev'd, Strickland v. Washington, 466 U.S. 668 (1983)). It is by no means obvious that the court would have reached the same result under Strickland, especially in light of Strickland's more demanding standard of prejudice.[2]

Nor is petitioner helped by United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991). There, defense counsel conceded in his closing argument that there was no reasonable doubt that his client had committed the charged bank robbery. The case was not capital, so there was no question of conceding responsibility for the crime in order to encourage the jury to exercise mercy in determining the punishment. The court of appeals held that counsel's concession of guilt deprived the defendant of his right to effective assistance, stating that it constituted "an abandonment [by counsel] of the defense of his client." Id. at 1074. In so doing, the court stressed that there was no claim that counsel had acted in furtherance of any identifiable trial strategy. Id. at 1075-1076. In this case, in contrast, counsel's concession was a reasonable tactical maneuver, undertaken with petitioner's approval, that in no way constituted an "abandonment" of his client.

2. Petitioner also contends (Pet. 5-15) that he was entitled to a certificate of appealability on his claim that counsel was

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[2] Petitioner's case is also quite different from Young v. Zant, 677 F.2d 792 (11th Cir. 1982). In that case, which also predated Strickland, the court of appeals rested its determination that counsel provided constitutionally ineffective assistance on a variety of errors, including counsel's decision to present an insanity defense when there was no evidence to support it and counsel's failure to recognize that the government's case was "extremely thin" on a critical element of the offense. Id. at 798.

unconstitutionally ineffective at the punishment phase of the trial because of counsel's request for the "lesser sentence" instruction. Petitioner is correct that the only sentences available for the crime of kidnapping with death resulting are death and life imprisonment without release. See Jones, 527 U.S. at 414-415 (Ginsburg, J., dissenting).[3] Accordingly, defense counsel's requested instruction on the sentencing options available to the jury was incorrect insofar as it suggested that the jury could recommend a lesser sentence. But there is no merit to petitioner's claim that the request for the erroneous instruction amounted to ineffective assistance of counsel.

To begin with, defense counsel's request for the erroneous instruction was not objectively unreasonable. The FDPA, 18 U.S.C. 3593(a), states that the jury must unanimously recommend "whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." This Court has held that, where the jury is invested with the responsibility of imposing sentence, it must be presented with all the authorized sentencing options. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). As the court of appeals observed on direct appeal, at the time petitioner was sentenced, "no clearly established law answered the question of whether § 3593 or the substantive criminal statute under which the defendant is convicted provides the correct sentencing options." 132 F.3d at 248. See

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[3] The government conceded this point in Jones I (see 527 U.S. at 387 n.8) and in the court below (see Opposition to Application for Certificate of Appealability 19).

also Pet. App. B5. In those circumstances, counsel's request for the "lesser sentence" instruction (from which petitioner could possibly have derived a strategic advantage) was not outside the range of reasonably competent assistance. See id. at B7 (finding that "[d]efense counsel made an informed strategic decision to request that the jury be instructed on all of the sentencing options set forth in 18 U.S.C. § 3593(e)").

In any event, as both the district court and court of appeals concluded, petitioner was not prejudiced by the instruction. See Pet. App. A10, B7. In support of his claim of prejudice, petitioner relies in part (Pet. 7-8) on Simmons v. South Carolina, 512 U.S. 154 (2002), and its progeny. Under Simmons, where future dangerousness in society is at issue and life without parole is the only authorized alternative to the death penalty, the jury must be told of the defendant's parole ineligibility. Id. at 161-162. See also Kelly v. South Carolina, 534 U.S. 246 (2002); Shafer v. South Carolina, 532 U.S. 36 (2001). In adopting that rule, the Court was concerned that the jury in Simmons might falsely have believed that Simmons could be released on parole if he were not executed. 512 U.S. at 161. As the court of appeals explained (Pet. App. A11), that concern is not implicated in this case, because the jury knew that it had the power to sentence petitioner to life without possibility of release as an alternative to death. The "lesser sentence" instruction did not deprive the jury of that power. Accordingly, unlike in Simmons, the jury here could not have

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